

Great uncertainty, but preparations for Unitary Patent system continue

Kluwer Patent Blog
September 7, 2019

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Please refer to this post as: *Kluwer Patent blogger, 'Great uncertainty, but preparations for Unitary Patent system continue', Kluwer Patent Blog, September 7 2019, <http://patentblog.kluweriplaw.com/2019/09/07/great-uncertainty-but-preparations-for-unitary-patent-system-continue/>*

Despite all uncertainty regarding the future, due to the ongoing Brexit saga and the German constitutional complaint, preparations for the Unitary Patent system are quietly going on. The EPO Select Committee gathered information on national measures accompanying the implementation of the system which was distributed among members of the Committee this summer. Also, the epi published an update earlier this week on the ratification of the Unified Patent Court Agreement, the Protocol on Provisional Application, local and regional divisions and languages of procedure in all future member states. The EPO sent a questionnaire to UP member states inquiring, among others, whether any legislation is envisaged or has been adopted for implementation of the Unitary Patent system, such as amendments to the Patent Act or regulations. Only Belgium, Denmark, Italy, Lithuania, Finland and the UK have already adopted such legislation; in other member states it is 'envisaged and/or engaged' or 'under consideration'.

Almost all UP member states have plans to open the possibility to validate a European patent where a request for unitary effect has been rejected either by EPO or UPC or unitary effect has been revoked. In Greece, France and Ireland, a so-called safety net is 'under consideration'. Only in the UK a safety net is not envisaged.

Other questions of the EPO concerned the possibility of double protection of a national and a Unitary Patent ('yes' in Denmark, Estonia, Germany, Austria, France, Hungary and Sweden, 'under consideration' in several other states) and the applicability of the Unitary Patent in overseas territories and areas. In France, the possibility of extension to these territories 'is being studied'. Of the Dutch territories, Curaçao and Sint Maarten are considering to ratify the UPC Agreement. If they decide to ratify, the UPC Agreement will then also be ratified for Bonaire, Sint Eustatius and Saba. The UK's ratification 'included the Isle of Man'. But although they are part of the Kingdom of Denmark, the UP system doesn't cover the Faroe Islands or Greenland. The EPO information will be made available to the public once the Unitary Patent becomes operational.



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According to the information published earlier this week by the epi on the state of affairs regarding the Unified Patent Court, eleven UPC member states – Belgium, Bulgaria, Denmark, Estonia, Finland, France, Italy, Luxembourg, the Netherlands, Sweden and the UK – have both ratified the UPCA and are (or expressed consent to be) bound by the PPA. About the UK, the report states: 'Despite the "Brexit", the UK Government intends to explore legal solutions to enable the UK to stay in the system when it leaves the EU.' Lithuania, Latvia and Portugal ratified the UPCA but have not yet signed the PPA. Malta also ratified and it will issue a unilateral declaration to be bound by the PPA. Austria ratified the UPCA and signed the PPA, but the protocol still needs to be ratified.

The situation in Germany is explained as well: 'Upon a complaint regarding the constitutionality of this law, the German Federal Constitutional Court has requested the Federal President to postpone its issuance. (...) Recently, some Members of the German Parliament (including the AfD) asked questions to the German Government regarding the budget for the UPC. The Government's answer to certain questions might mean that ratification by Germany will be postponed until Brexit and its consequences for the UPC are clear, even if the Constitutional Court would dismiss the case. The responses (...) reveal the ongoing engagement of the German Government to support (also financially) the preparation and ratification of the UPC.'

Ratification of the UPCA in Hungary was delayed due to a decision of the Hungarian Constitutional Court from 26 June 2018, that ratification would not comply with the Constitution. Therefore, an amendment to the Constitution will be necessary.

In Romania, draft legislation for ratification of the UPCA and the PPA was published for consultation in June 2017. In Slovenia ratification was approved by Parliament, but the instrument of ratification hasn't yet been deposited. Slovenia will issue a unilateral declaration to be bound by the PPA.

Before Ireland is able to ratify the UPCA, a referendum will have to be held, which is unlikely to happen as long as there is uncertainty about the Brexit and the German constitutional complaint. In Cyprus, there is no progress. In the Czech Republic no steps are taken for ratification either. 'A study carried out reported a negative impact of the UPC on Czech firms and on the Czech economy and budget. It is moreover noted that the present quality of machine translation into Czech must be improved', according to the epi report. Discussions for a local or regional division with Slovakia 'are only at the beginning'.

In Greece a consultation on the draft ratification law was completed at the beginning of 2017 and a study commissioned by the government on the impact of unitary patent protection on the economy. The Slovak Republic will wait with ratification until the UP system is operational. 'Officials are discussing whether a study on the impact of the UPC on the Slovak economy should be conducted.'

'Potential candidates'

The epi summary also includes Poland, Croatia and Spain, 'being member states of the European Union and potential candidates for joining the UPC in the future' – an interesting phrase considering the discussion which started after the Brexit referendum whether the UP system is for EU members only or for other EPC member states as well.



In Spain the Unitary Patent package is no longer a current issue, in the light of the uncertainty caused by the Brexit and the complaint before the German Constitutional Court, according to the summary. Croatia is still at a preparatory stage of joining the enhanced cooperation on unitary patent protection. Epi members 'have been unofficially informed that Croatian IPO has been enticed by the Ministry of Justice to take initiative and to bring the subject to the competent authorities' attention again.' The position of Poland, which participated in the enhanced cooperation concerning Unitary Patent protection but decided not to sign or ratify the UPCA, hasn't changed.

EU information on UPCA ratifications and the support for the PPA.